

Testimony of
The Honorable Patrick Leahy

October 8, 2002

Judiciary Committee Prepares To Vote On 100th Judicial Nominee

Opening Remarks Of Chairman Patrick Leahy
Judiciary Committee Business Meeting
October 8, 2002

We have 26 additional Bush nominees and 21 bills on the Committee agenda on which we can make progress.

We have 17 judicial nominees on the agenda for which we have expedited hearings over the last few weeks of this session as their ABA peer reviews were received. I believe that Democrats are prepared to report all of them to the Senate today on an expedited basis to help fill vacancies in our federal courts around the country.

During the last 15 months we have proceeded with more hearings for more nominees and then voted on more nominees than during the last 30 months in which the Senate was controlled by those on the other side of the aisle. With the 17 judicial nominees on the agenda today, this committee can have voted on 100 judicial nominations. Indeed, the nominees listed on the agenda only for today are as many judges as the Republican majority was willing to confirm in the entire 1996 session. By proceeding with this agenda today we will coincidentally accomplish what it took the Republican Senate a full year to do when it confirmed only 17 District Court judges and no judges for to the Circuit Courts all session.

We have not been able to accomplish all that I would have liked but we have made progress and worked hard to do as much as we could do. Over the last several weeks we have tried to proceed simultaneously with a number of the President's more controversial nominees to the Circuit Courts, as well as these important District Court nominations. It has proven difficult. As has always been true, the more controversial nominations are taking more time and our efforts to proceed simultaneously on the nominations of Dennis Shedd, Michael McConnell and Miguel Estrada are not yet completed. A number of Senators still have concerns. Those nominations remain pending and we will continue to work on them. I hope to be able to improve on the record established when the Republican majority went many months without ever voting on the nominations of Allen Snyder, Bonnie Campbell, Clarence Sundram, Fred Woocher and so many other nominees in the recent past. I am working so that all nominees on whom we have held hearings will not have to wait seven months and more or wait in vain and never be considered by the Committee.

Of course the hearings on Professor McConnell and Mr. Estrada were only recently held. The hearing on Judge Shedd was longer ago. With respect to the Shedd nomination the Committee

has continued to receive opposition from South Carolina and African-American and other civil rights organizations and leaders from around the country. Senators are taking those concerns seriously and are being thoughtful and deliberate in reaching their own conclusions.

In past weeks the Committee has received hundreds of letters from individuals and organizations, from South Carolina, from other states in the Fourth Circuit, and beyond, expressing concerns about elevating Judge Shedd, and these letters raise serious issues. Many of these letters have arrived in just the last week or so. We have just received a letter from the Mexican American Legal Defense and Educational Fund, citing the interests of the many Latinos living in the Fourth Circuit, and expressing opposition to Judge Shedd. A letter arrived recently from the Black Leadership Forum asking for more time to consider the nomination. It was signed by a number of well-respected African-American leaders, including the Forum's chairman, Dr. Joseph Lowery, and more than a dozen other nationally known figures. In recent weeks, state legislators from Delaware, North Carolina, South Carolina and Maryland have written to the Committee about their misgivings about the elevation of Judge Shedd. And hundreds, probably thousands by now, of letters from South Carolina citizens have been arriving in my office, urging a closer look at Judge Shedd's fitness for the Fourth Circuit. This circuit, so mistreated by the Senate during the last presidential administration, deserves to have the voices of its citizens heard.

Throughout the Clinton Administration, Republicans resisted attempts to integrate the Fourth Circuit, the circuit with the highest population of African-American citizens. In 1995 and 1996, in the 104th Congress, President Clinton nominated his first African-American candidate, Judge James Beaty, a U.S. District Court Judge for the Middle District of North Carolina. He never received a hearing. Judge Beaty was renominated in the 105th Congress in 1997 and 1998, and no hearing was scheduled for him. He was renominated again in 1999 in the 106th Congress but, again, this nomination was returned to the President without a hearing or any action. Judge Beaty's nomination was pending for more than 30 months without a hearing. Other 4th Circuit nominations that were not accorded hearings in 2000 were Judge Andre Davis and Elizabeth Gibson.

President Clinton tried again in the 106th Congress, nominating another African-American candidate, Judge James Wynn, a North Carolina Court of Appeals Judge. He, too, was denied a hearing. He was renominated at the start of the 107th Congress. After pending for 16 months without a hearing, Judge Wynn's nomination was among those withdrawn by President George W. Bush.

Another nomination to the Fourth Circuit withdrawn by President Bush was that of Judge Roger Gregory. I commended his two Republican Senators for urging the White House to do the right thing and renominate him, and Judge Gregory's was the first nomination on which the Committee and the Senate proceeded after the change in majority.

Beginning the debate on the nomination of Judge Shedd would not result in a final vote today but might well have prevented Committee action on 17 other judicial nominees. In our efforts to do as much as possible to help fill judicial vacancies, we have sought from the outset first to proceed expeditiously on the President's relatively noncontroversial nominations rather than be bogged down with the more controversial ones. We continue that process today. With some cooperation we can report and the Senate can confirm 17 more judges before we end this session who will

help the federal courts in Alabama, Iowa, Rhode Island, Texas, Tennessee, Delaware, California, Washington, North Dakota, New Jersey and the District of Columbia.

We have demonstrated bipartisanship support on this Committee toward the vast majority of this President's judicial nominees. In the 15 months since the change in Senate control in the summer of 2001, we now have held hearings for 103 of President Bush's judicial nominees, including 20 nominees to the Circuit Courts. It took the Republican-controlled Senate 33 months -- almost three full years -- to hold hearings for 100 of President Clinton's judicial nominees. We have reached the century mark in less than half that time.

This committee has already voted on 83 judicial nominees in 15 months, including 17 circuit court nominees, and reported 81 favorably to the Senate. That is more judicial nominees given hearings and more judicial nominees voted on by the Committee than during the last 30 months in which a Republican majority controlled the Senate. We have considered more judicial nominees in less than half the time.

The Senate has already confirmed 80 of the President's judicial nominations. We have already confirmed more of President Bush's judicial nominees in less than 15 months than were confirmed in the last 30 months that a Republican majority controlled the Senate. Again, we have done more in half the time. We have also already confirmed more of President Bush's judicial nominations since July 2001 than were confirmed in all of 1989 and 1990 together -- the first two full years of the term of his father.

In all, since the summer of 2001, we have held more hearings - 26 -- for more judicial nominees - 103 - than in any comparable 15-month period of the six and one-half years in which Republicans last controlled the Committee. We have held more hearings for Circuit Court nominees - 20 -- than in any comparable period of the prior six and one-half years of Republican control, when our predecessors allowed an average of only seven Circuit Court nominees to be confirmed per year. Fourteen Circuit Court nominees of this President have already been confirmed. While there is no Circuit Court nominee on today's executive agenda, in the prior three weeks we held two hearings for controversial Circuit Court nominees back to back.

Professor McConnell, nominated to the Court of Appeals for the 10th Circuit, has submitted lengthy answers to a number of written follow-up questions, some of which only arrived at the Senate yesterday. Members are in the process of conscientiously reviewing those answers, and some of my colleagues have indicated that some additional follow-up questions may be submitted to this nominee. Similarly, the transcript from the hearing for D.C. Circuit Court nominee Miguel Estrada is being reviewed. I understand that some follow-up questions will be submitted to Mr. Estrada later this week.

On the agenda today from the hearing yesterday is Judge Jose Linares, who has experience as a State court judge and has been recognized for the countless hours he has spent helping Hispanics and other members of the community. Also on today's agenda is United States Magistrate Judge Alia Ludlum, who has also been involved in the Hispanic community and has a great deal of experience as a judge despite her youth. These nominees are conservatives, and both of them had

significant judicial experience and written records on which they could be evaluated. Because of their records they were given prompt hearings and are receiving prompt Committee votes.

We know that there is a great deal of interest in the progress of the nominations of Professor McConnell and Mr. Estrada and in their answers. I am certain that the Members are proceeding expeditiously and fairly in their consideration of these nominations, given the other demands on their time at this late point in the session and with the Nation's attention focused squarely on the economy and the prospect of war.

The Fourth Circuit is not the only circuit that was subject to years of delay and obstruction during the period of Republican control. The D.C. Circuit, the 5th Circuit, the 6th Circuit, the 9th Circuit and the 10th Circuit all had nominees who waited months and years to get hearings, votes, and consideration, and several of President Clinton's nominees to these circuits never received a hearing or a vote. I will be interested to see if those who will undoubtedly complain that Judge Shedd, Professor McConnell and Mr. Estrada are not getting a vote today spoke out against the delays in hearings or votes of so many Circuit Court nominees of the prior President. Despite this recent history, Democrats are working hard to restore order and fairness to the confirmation process. When there are serious concerns about a nomination, however, time may be needed to adequately consider the merits.

We have been almost twice as productive as our Republican predecessors. In the six and one-half years of Republican control, before the reorganization of the Committee last summer, vacancies on the Courts of Appeals more than doubled from 16 to 33 and overall vacancies rose from 65 to 110. In addition, 47 new vacancies have arisen since last summer. With the 80 circuit and district court nominees the Senate has confirmed, there are now 77 vacancies, not the more than 150 vacancies that would exist had we stalled and done nothing as some Republicans said we would do.

Of course, the President has yet to nominate anyone for 30 of the current vacancies and does not acknowledge that more than 100 of his nominees have been given expeditious hearings. Due to the White House's refusal to allow ABA peer reviews to begin prior to nomination and because the ABA peer reviews have been taking between 50 and 60 days from the time of nomination, the White House knows that many of the most recent nominees will not have their paperwork completed in time for hearings this session. Indeed, every district court nominee with a complete file on October 2, the day yesterday's hearing was noticed, has received a hearing.

Only seven have completed files -- ABA reviews and the consent of both of their home state Senators - and have not received a hearing this year. The majority of the nominees who have not yet had a hearing do not have completed files. And several of those eligible for a hearing have relatively controversial records which require more review and more time than may be left in this session to complete. Ninety-four percent of this President's judicial nominees who had completed files have been given hearings. I would have been overjoyed if the Republicans ever gave 94 percent of the last Democratic President's judicial nominees hearings in the years Republicans controlled the confirmation process.

The earlier record shows something else. In 1995 for example, our predecessors allowed only 58 of the 86 pending judicial nominations of President Clinton to be confirmed. In 1996, they

allowed only 17 of the 49 pending judicial nominees, or 35 percent, to be confirmed, and no Circuit Court nominees. In 1997, Republicans allowed only 36 of the 79 Clinton nominees to be confirmed, or 46 percent. In 1998, they allowed 66 of 92 pending judicial nominees to be confirmed. In 1999, they allowed only 33 of the 71 judicial nominees to be confirmed -- about 46 percent -- and in 2000, they allowed only 39 of the 81 pending judicial nominees to be confirmed, or 48 percent. Thus, during their six years of control of the Senate during the Clinton Administration, Republicans allowed only about half of the judicial nominations to be confirmed on average per year.

Such comparisons are even more dramatic for President Clinton's Circuit Court nominees. For example, in 1996, Republicans allowed none -- zero percent and the absolute number of zero - Circuit Court nominees to be confirmed. In 1997, Republicans allowed only seven of President Clinton's 21 Circuit Court nominees to be confirmed, about one-third. In 1998, Republicans allowed 13 of the 23 pending Circuit Court nominees to be confirmed, which was 56 percent for the year-- their best year for Circuit Court confirmations in their six and one-half years of control of the Senate. In 1999, our predecessors were back down to 28 percent, when they allowed only seven of the 25 Circuit Court nominations made to be confirmed, or about one of every four. In 2000, Republicans allowed only 8 of the 26 Circuit Court nominees pending to be confirmed, or 31 percent. All but one of the Circuit Court candidates initially nominated that year, were returned to President Clinton without confirmation. This recent history should put into perspective the claims and criticisms we hear about the Committee's treatment of Circuit Court nominees.

Partisans will pick at anything we do to find something to criticize. They criticized our holding unprecedented hearings on judicial nominees during the August recess in 2001. They criticized our accommodating requests of Republican Senators to proceeding first with nominees from their home States rather than proceed in the order in which nominees were sent to the Senate. They criticized our effort to fill as many judicial vacancies as quickly as possible by expediting consideration of consensus nominees rather than becoming bogged down in the most controversial nominees first. I can only imagine how they will use our extra efforts for nominees this week against us and our willingness to proceed on 17 judicial nominees on an expedited basis today as this session draws to a close.

We have worked hard to restore fairness to the judicial confirmation process. Republicans delayed and defeated through inaction scores of judicial nominees. Too many languished for months and as long as four years before they were returned without a hearing or without a vote. Some were finally confirmed after four years of delay. We have made significant progress in that regard. No nominee on the agenda today, or not on the agenda today, has been waiting that long. Democrats are considering more judicial nominees and doing so faster than before.

Despite the speed with which we have been moving to address judicial vacancies, we are mindful that advice and consent does not mean giving the President carte blanche to pack the courts with ideologues from the right or left. The system of checks and balances in our Constitution does not give the power to make lifetime appointments to one person alone to pack the courts with judges whose views are outside of the mainstream and whose decisions would further divide our nation. I have gone out of my way to encourage the White House to work in a bipartisan way with the

Senate, like past Presidents, but, in all too many instances, they have chosen to bypass bipartisanship cooperation in favor of partisanship. The American public expects their federal courts to be fair forums and not bastions of favoritism on the right or the left. These are the only lifetime appointments in our system of government, and they matter a great deal to our future. We are moving quickly, but responsibly, to fill judicial vacancies with qualified nominees we hope will be competent and fair.

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